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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

THE MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION TRUST and the WELFARE PLAN of the MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION,

*Petitioners,*

v.

BANK ONE, TEXAS, N.A., formerly known as DEPOSIT INSURANCE BRIDGE BANK, NATIONAL ASSOCIATION, the WELFARE PLAN of the DEPOSIT INSURANCE BRIDGE BANK EMPLOYEES' BENEFICIARY ASSOCIATION, the DEPOSIT INSURANCE BRIDGE BANK BENEFICIARY ASSOCIATION TRUST, BANC ONE MORTGAGE COMPANY, TEXAS, formerly known as MBANK MORTGAGE COMPANY, MCORP, MCORP FINANCIAL, and MCORP MANAGEMENT,

*Respondents.*

On Petition for a Writ Certiorari to the United States Court of Appeals For the Fifth Circuit

## BRIEF FOR BANK ONE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals properly conducted a *de novo* review of unambiguous provisions in a written contract?

2. Whether the court of appeals correctly ordered dismissal of the case below where alternative relief in the form of instructions to a fiduciary had been sought, but necessary parties whose interests would be directly affected by such instructions had not been joined as parties?

3. Whether the stay of the district court judgment by the court of appeals can itself constitute reversible error and, if so, whether the stay was proper?

## LIST OF ALL PARTIES

The following are parties to this proceeding:

1. Welfare Plan of the Mercantile Employees' Beneficiary Association

2. Jimmy F. Taylor and MCorp Management, Inc. have prosecuted this action at various times as the administrative committee for and on behalf of the MEBA Welfare Plan.

3. The Mercantile Employees' Beneficiary Association Trust

4. BANK ONE, Texas, N.A. (formerly known as Deposit Insurance Bridge Bank, National Association), a subsidiary of Banc One Corporation, but formerly owned by the Federal Deposit Insurance Corporation

5. Deposit Insurance Bridge Bank Employees' Beneficiary Association Trust

6. Welfare Plan of BANK ONE, Texas, Employees' Beneficiary Association

7. Banc One Mortgage Company (formerly known as MBank Mortgage Company)

8. MCorp, Inc.

9. MCorp Financial, Inc.

10. MCorp Management, Inc.

The undersigned counsel of record is not aware of any subsidiaries of any of the foregoing corporate parties that are not wholly-owned unless specifically noted.

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## CITATIONS OF OPINIONS AND JUDGMENTS

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was not published. The district court's findings of fact, conclusions of law and final judgment are reported at *Taylor v. BANK ONE, N.A.*, 137 Bankr. 624 (S.D. Tex. 1992).

## JURISDICTION

This Court's jurisdiction was invoked under 28 U.S.C. § 1254(1). The Court of Appeals entered its opinion and judgment on April 22, 1993 and it denied a Petition for Rehearing and Suggestion for Rehearing En Banc on July 15, 1993. The Petition for Writ of Certiorari was filed on September 1, 1993.

## STATEMENT OF THE CASE

This action is an attempt by Petitioners to shift to Respondent BANK ONE, Texas, N.A. ("BANK ONE"), the purchaser of certain assets from the receiver of a group of failed Texas banks, Petitioners' own continuing responsibility to provide welfare benefits to the retired and disabled former employees of those failed Texas banks.

On March 28, 1989, the Office of the Comptroller of Currency ("Comptroller") declared insolvent twenty banks (the "Failed Banks") owned directly or indirectly by MCorp, Inc. ("MCorp")[1]. (FF 6) On that same day, the Federal Deposit Insurance Corporation ("FDIC") was appointed

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[1]An involuntary petition for bankruptcy was filed against MCorp on March 21, 1989. (FF 1) ("FF" refers to the district court's Finding of Facts contained in the Appendix to the Petition for Writ Certiorari ("Pet")).

Receiver for each of the Failed Banks ("FDIC-Receiver")[2] and sold some of the assets of the Failed Banks to The Deposit Insurance Bridge Bank, National Association ("Bridge Bank")[3], a newly-formed bridge bank owned by the FDIC, in exchange for the assumption of certain specified liabilities. Bridge Bank immediately employed all active employees of the Failed Banks. (FF 7) This suit concerns benefits payable to former employees of the Failed Banks who retired or became disabled prior to the receiverships and were never employed by Bridge Bank.

MCorp had established the Welfare Plan of the Mercantile Employees' Beneficiary Association (the "MEBA Plan") to provide benefits for its active, retired, and disabled employees, and those of its affiliates, pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et seq. ("ERISA"). It had also established the Mercantile Employees' Beneficiary Association Trust (the "MEBA Trust") as the funding medium for the MEBA Plan. (FF 2, 3) Participants in the MEBA Plan included active, retired and disabled employees of either the Failed Banks or other affiliates of MCorp, including six banks which did not fail (the "Solvent

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[2]The banking crisis affecting the MCorp system has been reported in *MCorp v. Bd. of Governors of Federal Reserve System of U.S.*, 900 F.2d 852 (5th Cir. 1990), *rev'd in part*, 112 S. Ct. 459 (1991) and *Texas American Bancshares v. Clarke*, 954 F.2d 329 (5th Cir. 1992) (implicitly overruling the case cited by Petitioners as background, *MCorp v. Clarke*, 755 F. Supp. 1402 (N.D. Tex. 1991).

[3]Bridge Bank changed its name to BANK ONE, Texas, N.A. after July 5, 1989, when Banc One Corporation entered into an Interim Management Agreement with FDIC for management of Bridge Bank pending its contemplated sale. (FF 5)

Employers"). (FF 19, 21) Employees of MBank Dallas, N.A., one of the Failed Banks, had administered the entire MEBA Plan. Neither the MEBA Plan nor the Solvent Employers had employee benefits personnel. Accordingly, after March 28, 1989, employees of Bridge Bank continued to administer the MEBA Plan for a fee under a contract between Bridge Bank and MCorp. (App E)[4]

Because Bridge Bank's first day of business was March 29, 1989, no new benefit plan or trust documents had been prepared before that day. On that day, however, the Bridge Bank employed Stephanie Burks, the former benefits manager for MBank Dallas, N.A., as its own benefits manager. Until the previous day, Ms. Burks had administered the MEBA Plan for the entire MCorp system. (FF 22)

Ms. Burks realized at once that the new employees of Bridge Bank were no longer covered by a benefits plan and that it was her responsibility to ensure that "7,000 people were covered by some plan". (FF 22, 24) On her first day at Bridge Bank, she established a new benefits plan for all active Bridge Bank employees ("Bridge Bank Plan") because she understood that they were no longer covered by the MEBA Plan she had formerly administered. While she wanted the Bridge Bank Plan to "mirror" the MEBA Plan, she understood and intended that the Bridge Bank Plan would provide benefits solely to the employees of Bridge Bank, with former employees of the Failed Banks continuing to receive their benefits from the MEBA Plan. (FF 24)

On March 29, 1989, Bridge Bank contracted for new life, business travel accident, and accidental death and dismemberment insurance policies and entered into a new

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[4]"App" refers to the Appendix following this brief.

benefit administration contract for its health benefits with Prudential Insurance Company of America ("Prudential"). (TR187)[5] The written contract later signed with Prudential specifically defined the participants in the Bridge Bank Plan as all active and retired employees of Bridge Bank, thereby excluding former employees of the Failed Banks that had not become Bridge Bank employees. (Pet 168a, 176a) Ms. Burks, on behalf of Bridge Bank, also employed new counsel to draft a new set of benefits plan and trust documents and entered into a separate trust agreement with a new trustee. (TR275-276, FF 27) Thus, upon commencing operations, Bridge Bank created new benefit plan documents, had a new sponsor for its benefit plan, had a new pool of participants, wrote out a new trust agreement, hired new attorneys, had new directors, formed a new plan committee, had new contracts and resolutions, acquired new policies, and established new trust accounts. (FF 27) Bridge Bank's Board of Directors formally adopted new benefit plan documents on May 5, 1989, effective as of March 29, 1989. (FF 8, Pet 122a, 151a)

Bridge Bank's actions in establishing the new benefits plan for its new employees created no "serious dilemma" for the MEBA Plan Administrator. The only question raised was which plan (or plans) was entitled to the approximately $6,200,000 in assets held by the MEBA Trust and in what proportions. (TR284) Most of the funds in the MEBA Trust, of course, had been contributed by or on behalf of individuals who had since become employees of Bridge Bank. (TR395-397) Both Petitioners and Respondents agree this question of entitlement is answered by the terms of Article XI of the MEBA Trust agreement.

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[5]"TR" refers to the trial transcript.

Petitioners, however, have incorrectly described the options available in Article XI of the MEBA Trust agreement upon dissolution or liquidation of any "participating employer". (Pet 6) As explained by the court of appeals, Article XI provides *three* options — not the two cited by Petitioners. (Pet 6, 15a-16a) These three options are (1) partial dissolution of the MEBA Trust with its proceeds distributed pro rata to or for the benefit of the participants who were withdrawn (§ 11.01, Pet 85a), (2) continuation of the MEBA Trust if the successor corporation adopts the trust agreement or otherwise assumes the duties and responsibilities of the MEBA Plan and Trust in accordance with the provisions of § 10.02 of the Trust (§ 11.02, Pet 86a), or (3) transfer of trust assets if a successor corporation establishes a separate plan and trust for the benefit of its own employees (§ 11.02, Pet 86a). Petitioners omit reference to the third option—just as they did in the court of appeals.

Bridge Bank elected the third option. It established a "separate plan and trust for the continuation of benefits for its employees" and sought a transfer of the portion of the excess assets[6] in the MEBA Trust that had been contributed on behalf of its employees — the former active employees of the Failed Banks. (Pet 115a, 151a) The MEBA Plan Administrator, however, refused to transfer the funds and further refused to pay benefits for the period after March 29, 1989 to any former Failed Bank employees subsequently employed by Bridge Bank. (App D)

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[6]The excess assets were those not required to pay claims either submitted or anticipated for the period prior to March 29, 1989, and were estimated by BANK ONE to be approximately $1.5 million. (Ex 75)

Petitioners now contend that Bridge Bank actually elected the second option—that is, to continue the MEBA Plan and Trust. (Pet 6) Notably, this position is directly contrary to that taken by Petitioners in 1989 when there were excess assets in the MEBA Trust which they wished to avoid transferring to the Bridge Bank Trust. As the court of appeals found, however, the terms of the MEBA Plan and Trust prohibited Bridge Bank from electing the second option for a number of reasons, most especially because MCorp refused to allow Bridge Bank to participate in its Plan. (Pet 13a, 17a-19a) To elect the second option, Bridge Bank would have had to comply with the provisions of § 10.02 of the MEBA Trust that required eligibility on the part of the successor corporation and adoption by written instrument, duly executed, acknowledged and delivered. Bridge Bank was not eligible to adopt the MEBA Plan because it was not an affiliate of MCorp and had never obtained the approval of the Compensation Committee of MCorp's Board of Directors as required by § 10.2 of the MEBA Plan. (Pet 105a) In addition, Bridge Bank never adopted the MEBA Plan, by written instrument or otherwise.

In 1989, MCorp consistently took the position that the Bridge Bank had not and could not become a participating employer. (App A-C). MCorp informed the bankruptcy court in its Disclosure Statement that the Failed Banks ceased participation in the MEBA Trust on March 29, 1989. (Ex 103[7], TR153-54) Jimmy F. Taylor ("Taylor"), the MEBA Plan Administrator, ordered the trustee of the MEBA Trust not to accept any contributions from the Bridge Bank or its employees, and not to pay any claims by active or former employees of Bridge Bank incurred after March 31, 1989. (App D). In order to block Bridge Bank's efforts to obtain a portion of the excess assets in the MEBA

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[7]"Ex" refers to a trial exhibit.

Trust, the MCorp Compensation Committee held an emergency early-morning meeting to amend the MEBA Trust on May 5, 1989 (the day Bridge Bank's board of directors was scheduled to consider adoption of the Bridge Bank Plan) to clarify that the Bridge Bank could not become a "successor employer" in the MEBA Plan and Trust.[8] (App A)

An even more basic flaw in Petitioners' argument, however, is its failure to acknowledge that Bridge Bank never adopted or assumed responsibility for the MEBA Trust in a document meeting the requirements of § 10.02 of the MEBA Trust agreement. On May 5, 1989, Bridge Bank's board of directors passed certain resolutions adopting the MCorp Pension and Moneymax Plans. Instead of adopting the MEBA Plan, however, the board resolved that it was in the best interest of Bridge Bank employees to establish a successor plan and trust for their benefit. (Pet 119a)

All of Bridge Bank's actions were designed to establish a successor plan and trust for the benefit of *its employees* as contemplated under the third option. At the May 5, 1989 meeting, Bridge Bank's board of directors adopted a welfare benefit plan for Bridge Bank's own employees effective March 29, 1989. (Pet 122a) In the May 10, 1989 letter referred to by Petitioners, Bridge Bank's president notified MCorp that it had "elected to establish a separate trust agreement for the continuation of benefit for *its employees*" (emphasis added) — the third option under Article XI of the MEBA Trust agreement. (Pet 115a) That letter, contrary to the representation made by

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[8]Although the district court held that the amendment was ineffective, the attempt itself is conclusive evidence that MCorp never permitted or intended Bridge Bank to become a participating employer.

Petitioners (Pet 6-7), did not demand payment of "all remaining MEBA Welfare Plan funds". Instead, it requested that the trust assets held "on behalf of the *active employees* of Bridge Bank be transferred to MTrust Corp., N.A., as Trustee of the Bridge Bank Employees' Beneficiary Association Trust Agreement". (emphasis added) Bridge Bank's president further clarified his request in the same letter by stating it was made in accordance with § 11.02 of the MEBA Trust and sought only "the pro rata portion of the assets held in the [MEBA Trust] which relate to the active employees of Bridge Bank." (App 115a-116a)

Taylor's true "dilemma" as Administrator of the MEBA Plan, simply put, was how to shift financial responsibility for future benefits for the retired and disabled former employees of the Failed Banks from MCorp to Bridge Bank. Taylor, of course, could have paid the Bridge Bank Trust that portion of the MEBA Trust funds attributable to Bridge Bank's employees and thereafter continued administering the MEBA Plan in accordance with its terms, including paying benefits to employees of the Solvent Employers and the retired and disabled former employees of the Failed Banks. Instead, he sought to protect MCorp and the Solvent Employers—at the expense of the retired and disabled former employees of the Failed Banks—by purporting to allocate the commingled MEBA Trust funds between the Solvent Employers and the Failed Banks, a procedure not authorized in the MEBA Trust. He then used only the funds he allocated to the Failed Banks to satisfy claims from the retired and disabled former employees of the Failed Banks. When those funds ran out, he stopped paying benefits to those retirees and disabled persons, but continued benefits to employees (and similarly situated former employees) of the Solvent Employers.

In fact, Taylor instructed the trustee for the MEBA Trust not to pay claims of Bridge Bank employees incurred after March 31, 1989, and not to accept contributions from Bridge Bank for coverage of its employees after March 31, 1989. (App D) When the trust funds he allocated to the Failed Banks began running low, however, he totally reversed his field by commencing this suit, seeking a declaration that Bridge Bank assumed responsibility for the benefits payable to retired and disabled former employees of the Failed Banks *by becoming a participating employer in the MEBA Plan until June 9, 1989.* Inexplicably, Taylor never filed a claim against the bankruptcy estate of MCorp (the MEBA Plan sponsor), or in any of the receiverships of the Failed Banks, although these options were called to his attention by Respondents.

Taylor's newly-found concern about co-fiduciary liability arising from Bridge Bank's request for transfer of a portion of the MEBA Trust assets is baseless. (Pet 7) To begin, Taylor made no allegations in his pleadings about such concerns. Furthermore, the litigation agreement ("Litigation Agreement") between FDIC and BANK ONE executed on April 12, 1990 (one year later), which Petitioners so stridently criticize, merely clarified the proper financial responsibilities between the parties. (Ex 84) Because Bridge Bank had been unsuccessful in obtaining a transfer of the excess assets in the MEBA Trust attributable to its employees, the FDIC provided the initial monies to fund the Bridge Bank Plan. The FDIC also agreed to indemnify Bridge Bank for any liabilities of the Failed Banks not assumed by Bridge Bank when it purchased their assets. (Ex 16, 18) The Litigation Agreement clarified that FDIC, as the source of initial funding, would get the benefit of any recovery of such excess funds by Bridge Bank from the MEBA Trust with "the method, manner, and amount . . . [to] be agreed to by the parties at a later date." (Ex 84)

Nothing in the Litigation Agreement deprived the beneficiaries and participants of the Bridge Bank Plan and Trust of their benefits. It simply recognized the FDIC's right to be repaid the monies advanced to benefit Bridge Bank's employees — a right that became academic since the MEBA Trust otherwise spent the funds Taylor allocated to the Failed Banks and Bridge Bank did not thereafter pursue its claim to any such funds.

In addition, Taylor clearly did *not* rely on Bridge Bank's representation that it had become a participating employer in the MEBA Plan, as he now claims. (Pet 8) If he had relied on such a representation, he would never have devised the scheme for allocation of the MEBA Trust funds between the Solvent Employers and the Failed Banks. Specifically, if Taylor had truly believed that Bridge Bank had become a participating employer by adopting the MEBA Trust under § 11.02, he would have continued paying benefits to Bridge Bank employees until Bridge Bank's withdrawal, and then distributed the excess funds as provided in § 11.02. If, however, Bridge Bank had effectively exercised the third option under Article XI by establishing a separate plan and trust for its employees (which is what Bridge Bank announced in its May 10, 1989 letter) (Pet 114a), Taylor would have distributed the trust funds attributable to Bridge Bank employees to the new trust. Taylor, of course, did neither.

The court of appeals correctly determined, as a matter of law, that Bridge Bank had not become a participating employer in the MEBA Plan and consequently was not liable to provide benefits to former employees of the Failed Banks who were never employed by Bridge Bank.

## ARGUMENT

The court of appeals correctly conducted a *de novo* review of the district court's conclusions of law. As the court of appeals recognized, the essence of this case is contract interpretation. Appellate courts review the interpretation of unambiguous written contracts on a *de novo* basis. *Pierre v. Conn. General Life Ins. Co.*, 932 F.2d 1552, 1561 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 453 (1991). The court of appeals did not make unwarranted fact findings or deny benefits to retired and disabled employees of the Failed Banks. Instead that court held, as a matter of law, that Bridge Bank could not have become a participating employer under the MEBA Plan and Trust and thus did not inadvertently assume liability for benefits payable to former employees of the Failed Banks who did not become active employees of Bridge Bank. The court of appeals' opinion in no way affected the entitlement of those former employees to benefits under the MEBA Plan and Trust.

### I. The Court of Appeals Properly Conducted A *De Novo* Review of An Unambiguous Contract.

Contrary to Petitioners' assertion, the court of appeals made no "sweeping" fact finding. That court found that the district court had erred as a matter of law in concluding that Bridge Bank unintentionally elected to "adopt the MEBA Plan and Trust Agreement." (Pet 17a) The court of appeals conducted its review from the four corners of the relevant documents. For instance, contrary to Petitioners' claim (Pet 14), the finding that "Bridge Bank, through its benefit administrator, intended to set up a plan new and distinct from the MEBA Plan" *was first made by the district court*, not the court of appeals. In FF 13, the district court found that "Bridge Bank attempted to set up its own Plan, and related Trust agreement". (Pet 39a) In FF 24, the district

court found that Ms. Burks, Bridge Bank's benefits administrator, intended to set up a new benefits plan pertaining solely to the employees of Bridge Bank, and distinct from the MEBA Plan. (Pet 43a) Finally, in FF 27, the district court again found that Ms. Burks believed that a separate plan had been established because Bridge Bank: "created new plan documents; had a new sponsor; had a new pool of participants; wrote out a new trust agreement; had new attorneys; had new directors; had a new plan committee; had new contracts and resolutions; had new policies; and, had new trust accounts." (Pet 44a).

Petitioners are also mistaken in concluding that "[t]here is *no evidence* to support the court of appeals' appellate fact finding that Bridge Bank carried out its intent to set up a new employee welfare plan for its 7,000 employees". (Pet 14; emphasis in original) The district court specifically found that the Bridge Bank Plan had new insurance policies, new documents, and new contracts and resolutions. (FF 27) Ms. Burks also provided uncontradicted testimony that, on her first day as a Bridge Bank employee, she contacted Prudential to arrange new insurance policies and a new contract for benefits administration. (TR187) The later execution date of the written agreement between Prudential and Bridge Bank hardly contradicts the *district court's* fact finding, given Ms. Burks' testimony and that the written contract was explicitly made effective April 1, 1989.

Petitioners are misleading in their discussion of the administration agreement between Bridge Bank and the MEBA Plan. (Pet 15) As of March 29, 1989, MCorp and the MEBA Plan needed the former Failed Bank employees to administer that Plan. Bridge Bank therefore agreed to administer the MEBA Plan *for a fee* in accordance with a *written* Administrative Services Agreement with MCorp. (App E) The administration of the MEBA Plan by Bridge

Bank – under such circumstances hardly destroys the distinction between the MEBA Plan and the Bridge Bank Plan. Instead, the district court's findings that the two parties entered into an Administrative Services Agreement (FF 56) and that Bridge Bank obtained its own services contract with Prudential supports the court of appeals' statement that "Bridge Bank carried out its intent to set up a new employee welfare plan for its 7,000 employees through the purchase and maintenance of new group insurance policy and through distinct administration of benefits commencing March 29, 1989." (Pet 23a)

Petitioners' assertion that BANK ONE continued to use the MEBA Plan summary plan description for the BANK ONE Plan is simply wrong. (Pet 15) Neither the findings of fact they reference nor the evidence presented at trial support such a claim. While Bridge Bank did not prepare a new summary description, neither did it continue using the old MCorp documents. Instead, Bridge Bank shipped all remaining summary plan descriptions to MBank El Paso, one of the Solvent Employers that could still make use of them. (TR249)

The district court's FF 24 and 65 do not support Petitioners' statement that BANK ONE must have included the "Subject Participants". (Pet 16) Both FF 24 and 26, as well as other evidence previously discussed, unequivocally show that the Bridge Bank Plan was established for its employees. Bridge Bank did not purchase the stock of the Failed Banks. It purchased certain assets from the receiverships of the Failed Banks and used those assets to establish a new business under a new name. As part of the compensation provided to its employees for their current services, Bridge Bank established its own employee benefit plan. For that reason, the terms of the Bridge Bank Plan and Trust specifically apply to Bridge Bank employees and

do not include former employees of the previous owners of some of Bridge Bank's assets—just as the terms of the MEBA Plan only applied to employees of its "participating employers".

Ms. Burks testified extensively about establishing the Bridge Bank Plan. Her testimony and the district court's FF 24 clearly indicated that the new plan was for the benefit of the 7,000 new Bridge Bank employees. (Contrast Pet 15)[9] The terms of the MEBA Plan and Trust precluded Bridge Bank from becoming a participating employer—so Bridge Bank could hardly have operated under the MEBA Plan at all, much less until June 9, 1989.

As noted by the court of appeals, to become a "participating employer" in the MEBA Plan, Bridge Bank had to meet the requirements which at trial became known as the "three A's" — (1) Affiliation, (2) Adoption, and (3) Approval. Section 10.2 of the MEBA Plan limits the companies which may participate in the Plan to those that are or become *affiliated* with MCorp and which with "the consent and *approval* of the Compensation Committee of the Board of Directors of the Company . . . *adopt* this Plan or any Benefit Plan hereunder for its Employees." (Pet 19a, 105a)

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[9]The stipulation referred to by Petitioners as to the meaning of "participants" applies to the MEBA Welfare Plan -- not the Bridge Bank Plan. (Pet. 15-16) Bridge Bank was not required to notify former employees of the Failed Banks of their exclusion from the Bridge Bank Plan since by the terms of the Bridge Bank Plan, former employees of the Failed Banks were never included unless they became employees of Bridge Bank.

### A. MCorp Did Not *Approve* Bridge Bank's Participation in the MEBA Plan

Petitioners completely ignore the requirement of approval by the Compensation Committee of MCorp's Board of Directors before Bridge Bank could become a participating employer. Petitioners also ignore all of the evidence presented at trial conclusively establishing that MCorp did not want Bridge Bank as a participating employer and that MCorp *never approved* such participation. (App A-B) The district court made no finding that such approval had ever been given.

Specific evidence that proves the approval requirement was never met includes:

(1) The Compensation Committee of the MCorp Board of Directors passed a resolution on May 5, 1993 attempting to amend the MEBA Trust to clarify and reaffirm the Plan sponsor's original intent that no business entity could adopt the MEBA Plan or Trust or become a successor or participating employer unless it received prior approval of the MCorp Board of Directors. The resolution also "confirmed that Bridge Bank is not a 'successor' or 'successor employer' as such terms are used in the Plan documents and related Trust instruments." (App A)

(2) MCorp wrote Bridge Bank informing it that it was never a participating employer in the MEBA Plan and that former Failed Bank employees who became Bridge Bank employees ceased to be entitled to benefits from the MEBA Plan and Trust on March 28, 1989. (App C)

(3) MCorp notified the bankruptcy court in its disclosure statement that the Failed Banks automatically ceased participation in the MEBA Plan and that active employees of the Failed Banks ceased their participation in the MEBA Plan after March 28, 1989. (Ex 103)

(4) Taylor, as Plan Administrator for the MEBA Plan, instructed the Trustee for the MEBA Trust not to accept any contributions from Bridge Bank relating to any period of coverage after March 31, 1989 and not to pay any claims by active or former employees of Bridge Bank incurred after March 31, 1989. (App D)

Thus, even if Bridge Bank had wanted to become a participating employer in the MEBA Plan, MCorp prevented such a result simply by refusing to approve Bridge Bank's participation.

### B. Bridge Bank Did Not *Adopt* the MEBA Plan and Trust

Likewise, the district court made no finding that Bridge Bank adopted the MEBA Plan and Trust in the manner specified by the documents. Section 10.02 of the MEBA Trust required adoption or assumption of the responsibilities of the Trust to be evidenced by written instrument, duly executed by a company's president or chief personnel officer. (Pet 85a) No such document is found in the record of this case. The resolution of Bridge Bank's board of directors that addressed pension and welfare benefit plans specifically adopted the MCorp Pension Plan; however, in stark contrast, there is no language in the resolution adopting the MEBA Plan. (Pet 120a)

How Petitioners can ignore the need for such a written instrument to evidence adoption of the Trust is puzzling. Again, § 11.02 of the MEBA Trust provides that any corporation succeeding to the interest of an employer by sale "may elect to continue this Trust by *adopting* this Trust Agreement or by otherwise assuming the duties and responsibilities of the Plan and Trust *in accordance with the provisions of Section 10.02 hereof*". (emphasis added) (Pet 86a) Section 10.02 clearly requires (in addition to the eligibility requirements of affiliation and approval) a written instrument, duly executed and delivered, to evidence such adoption or assumption. (Pet 85a)

The findings of fact of the district court also support the court of appeals' conclusion that Bridge Bank did not adopt the MEBA Plan. The district court specifically found that (1) Peter Bartholow, President and CEO of MCorp, believed Bridge Bank merely established a successor trust (FF 12), (2) Bridge Bank attempted to set up its own employee benefits plan (FF 13), (3) Bridge Bank established its own employee benefit plan and trust for its employees (FF 15), (4) Ms. Burks, Benefits Administrator for MCorp on March 28, 1989 and for Bridge Bank on March 29, 1989, intended to set up a new benefits plan for Bridge Bank employees, and (5) Ms. Burks took a number of actions to set up a new benefits plan consistent with her intent (FF 24-27).

### C. Bridge Bank Was Not an *Affiliate* of MCorp

It is undisputed that Bridge Bank was not an affiliate of MCorp. Petitioners, however, argue that affiliation is not required under Article 11 of the Trust. On the contrary, affiliation is a crucial eligibility requirement, designed to preserve the status of an ERISA trust—a concept that

Petitioners now conveniently ignore.[10] The court of appeals, charged with interpreting unambiguous documents, found that affiliation was a requirement under § 10.2 of the MEBA Plan and § 11.02 of the MEBA Trust for a successor corporation to adopt MEBA Plan.[11] (Pet 18a-19a) The court of appeals also noted that, regardless of whether affiliation was required, there is no doubt that approval by MCorp was a prerequisite for adoption of the MEBA Trust. (Pet 19a) As noted previously, that approval was undeniably lacking.

The precedent cited by Petitioners does not support their claim that the district court's legal findings are protected by the clearly erroneous rule. The court in *Carpenters Amended and Restated Health Benefit Fund v. Holleman Constr. Co. Inc.*, 751 F.2d 763 (5th Cir. 1985) addressed a question relating to the interpretation of an ambiguous contract. Unfortunately for Petitioners, however, that opinion acknowledged that when a contract can be interpreted from its four corners, a reviewing court is as competent as the trial court to do so. 751 F.2d at 766. In accordance with that latter principle, the court of appeals correctly determined that to adopt the MEBA Plan and Trust, Bridge Bank would have had to (1) be an *affiliate* of

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[10]Affiliation is necessary to preserve the status of plans maintained by a single controlled group of corporations. If Bridge Bank had become a participating employer, the MEBA Plan would have become a multiple employer welfare arrangement under § 3(40) of ERISA, 29 U.S.C. § 1002(40), thereby losing the preemptive effect of ERISA and rendering it subject to state insurance laws. 29 U.S.C. § 1144(b)(6)(A)(ii)

[11]Petitioners claim of ambiguity in the language comes too late. As the court of appeals observed, no such claim was made in the district court or the appellate court. (Pet 15a)

MCorp, (2) expressly *adopt* the terms on the Trust and (3) obtain *approval* from MCorp. None of these conditions were met.

### D. The Court of Appeals Correctly Interpreted the Relevant Documents

Petitioners incorrectly conclude that the court of appeals' opinion would allow a successor corporation to obtain trust assets without corresponding liabilities. (Pet 20) Bridge Bank assumed liability for benefits for 7,000 former employees of the Failed Banks (including the substantial present value of the expected costs of their retirement and disability benefits) without the MEBA Trust ever contributing any portion of its assets to defray such liabilities. (Pet 125a) Thus, Bridge Bank actually relieved the MEBA Trust of significant future obligations.

The Purchase and Assumption Agreement ("P&A") between the FDIC-Receiver and Bridge Bank also confirms that Bridge Bank did not assume liability for benefits payable to the retired and disabled former employees of the Failed Banks. (Ex 16) The P&A effected a transaction in which certain assets and liabilities were transferred by FDIC-Receiver to Bridge Bank pursuant to 12 U.S.C. § 1821(i)(1)(B) (West Supp. 1989). The liabilities assumed by Bridge Bank are specifically listed in § 2.1 of the P&A. As the court of appeals noted, the wording of this provision unambiguously conveys the exclusive nature of the liabilities assumed. Section 2.1 provides that the "Assuming Bank expressly assumes at book value and agrees to pay, perform and discharge all of the following liabilities of the Failed Bank . . . and none other." The MEBA Plan is not listed. (Pet 24a-25a)

Section 4.7 of the P&A (providing for the transfer of the trust business of the Failed Banks) simply is not applicable. It states that "[t]he trust business of the Failed Bank, *if any*, is hereby transferred to the Assuming Bank . . ." (emphasis added) Even if read broadly, § 4.7 relates only to the Failed Bank's responsibilities *qua* fiduciary or *qua* representative.[12] The liability sought to be imposed by Petitioners for funding the MEBA Plan, in contrast, was a contractual obligation undertaken by the Failed Banks. The MEBA Trust—not the Failed Banks—held the MEBA Plan assets in a fiduciary or representative capacity. The district court's conclusion that the P&A provided an additional and distinct basis for liability to the Failed Banks' retired and disabled employees was, therefore, an erroneous conclusion of law. (Pet 25a-26a)

Likewise, Petitioners' reference to the proof of claim filed (and later withdrawn) by BANK ONE in the MCorp bankruptcy proceeding ("Proof of Claim") lends no support to their position. The Proof of Claim did reference the

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[12]Section 4.7(a) provides further, in pertinent part, that

> "The Assuming Bank shall, without further transfer, substitution, act or deed, to the full extent permitted by law, succeed to the rights, obligations, properties, assets, investments, deposits, agreements and trusts of the Failed Bank under (i) trusts, executorships, administrations, guardianships, agencies and (ii) other fiduciary or representative capacities, all to the same extent as though the Assuming Bank had originally assumed the same; provided, that any liability based on the malfeasance or nonfeasance of the Failed Bank, its directors, officers, employees or agents with respect to the trust business of the Bank is not assumed hereunder."

funds held in the MEBA Trusts. Nothing in the Proof of Claim, however, indicated that those funds constituted "the trust business of the Failed Bank" or that they were held by a Failed Bank in a fiduciary capacity. The Proof of Claim carefully noted that funds were contributed to and held by the MEBA Trust, a third party. The Proof of Claim also recited that "participation by the Failed Banks in [the MEBA Plan] was terminated by MCorp as of March 28, 1989" and that BANK ONE established a successor plan and trust for the benefit of "Failed MBank Welfare Benefit Participants *employed* by [BANK ONE]". (emphasis added) (Ex 75)

### E. Estoppel Does Not Apply

The court of appeals correctly determined that its holding that Bridge Bank did not adopt the MEBA Plan and Trust Agreement vitiates Petitioners' estoppel argument. Since Bridge Bank did not adopt the MEBA Plan, it could not have acquired any extra-contractual liability by estoppel. *See Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 816 (9th Cir. 1992) (whether a claim is preempted by ERISA is reviewed *de novo* by the appellate court).

Indeed, the only way for the district court to have concluded that Bridge Bank was estopped from claiming that coverage under its welfare plan was limited to its own employees would be if it had made a finding that the terms of the Bridge Bank Plan were informally modified to include the retired and disabled former employees of the Failed Banks. The district court made no such fact finding. Instead, it found that Bridge Bank attempted to establish a benefits plan for its own employees. Bridge Bank did tell its employees that their benefits would not be changed as a result of the closing of the Failed Banks, but there is no evidence it ever represented that it would provide benefits to retired and disabled former employees of the Failed Banks

who did not become active employees of Bridge Bank. (Tr. 113, 158, 244).

A claim of oral modification is contrary to the central policy goals of ERISA. Therefore, ERISA-qualified employee benefits plans cannot be estopped. *Williams v. Bridgestone/Firestone, Inc.*, 954 F.2d 1070 (5th Cir. 1992) ("'ERISA precludes oral modifications to benefit plans . . . and claims of promissory estoppel are not cognizable in suits seeking to enforce rights to pension benefits.'") (quoting *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989)); *Henglein v. Informal Plan for Plant Shutdown for Salaried Employees*, 974 F.2d 391, 401 (3rd Cir. 1992) (a written ERISA plan, no matter how informal, cannot be orally modified); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 59 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1051 (1993) (estoppel is not available to vary the written terms of an ERISA plan); *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1586 (1993) (an ERISA plan cannot be modified by informal communications, whether oral or written); *Cromweli v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991), *cert. dism'd*, 113 S.Ct. 2 (1992) (claim of promissory estoppel is preempted by ERISA); *Alday v. Container Corp. of America*, 906 F.2d 660, 666 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (estoppel cannot be used to amend or modify an ERISA plan); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2nd Cir. 1988) (absent actual fraud, an ERISA plan is not subject to amendment as a result of informal communications between employer and beneficiaries). The ERISA statute itself specifically and clearly rejects the notion of oral modification as to employee benefits plans. 29 U.S.C. § 1102(a)(1) (1985). Accordingly, the court of appeals correctly determined, as a matter of law, that the doctrine of estoppel

could not create extracontractual liability in the formation of an employee benefits plan.

The Ninth Circuit has recently clarified its position on the applicability of equitable estoppel in ERISA cases in *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821 (9th Cir. 1992), holding that "a party cannot maintain a federal equitable estoppel claim against *a trust fund* where recovery on the claim would contradict written plan provisions." Thus, the Ninth Circuit case cited by Petitioners provides no support for their argument. In addition, the Seventh Circuit has limited the holding of *Black v. TIC Inv. Corp.*, 900 F.2d 112 (7th Cir. 1990) to the facts of that case. *Russo v. Health, Welfare & Pension Fund Local 705, Int'l Bd. of Teamsters*, 984 F.2d 762, 767 (7th Cir. 1993). In *Russo*, the Seventh Circuit reiterated its position that "ERISA does not recognize oral modification of a written benefit plan which precludes the use of estoppel principles to alter ERISA plans." *See also*, *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990).

Even if estoppel were permitted to modify the terms of ERISA documents, Petitioners' claim would fail because (1) Bridge Bank made no misrepresentations and (2) Petitioners did not rely to their detriment upon anything Bridge Bank said or did. Bridge Bank consistently claimed to have established a successor trust *for the benefit of its employees*. Bridge Bank never claimed that it would provide benefits for the retired and disabled former employees of the Failed Banks, and Petitioners do not contend that any such representation was made by Bridge Bank. The district court found that Bridge Bank claimed to be a "successor to the Failed Banks", and to have established "the Bridge Bank Welfare Plan and the Bridge Bank Trust as successors to the MEBA Welfare Plan and MEBA Trust". (FF 75) This finding is concededly true and supports Bridge Bank's

position that it established a successor trust for the benefit of *its employees* pursuant to § 11.02 of the MEBA Trust. As the district court found, such a claim "prevented payment of the trust funds directly to the participants of the Failed Banks and their beneficiaries." (FF 75) As the court of appeals noted (Pet 15a, 17a n. 4), however, the remainder of the district court's FF 75, as well as its FF 70, 71, and 73 constitute erroneous conclusions of law founded on neither logic nor authority.

Even if Bridge Bank had misrepresented that it had become a participating employer in the MEBA Plan and Trust with respect to the retired and disabled employees of the Failed Banks (and that Petitioners had believed the misrepresentation), the essential element of detrimental reliance is absent. See *Lyng v. Payne*, 476 U.S. 926, 935 (1986) ("An essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations.") If Petitioners had believed and relied upon Bridge Bank's alleged misrepresentations about becoming a participating employer, they would have accepted claims and paid benefits to Bridge Bank employees from March 29, 1939 until June 9, 1989, and then transferred the funds they allocated to the Failed Banks to the Bridge Bank Trust to continue those benefits, all as contemplated by § 11.02. Petitioners did not do either, or act to their detriment in any other way. Rather, they kept all the disputed funds. Interpreted in its best light, Petitioners' claim is only that they became paralyzed by the uncertainty created by Bridge Bank's allegedly conflicting representations. (Pet 7) Such a self-serving paralysis, justified or not, is not detrimental reliance.

The Proof of Claim filed by BANK ONE in the MCorp bankruptcy does not support Petitioners' claim of judicial estoppel. (Pet 22) The Proof of Claim specifically states that BANK ONE established the Bridge Bank Plan for

the benefit of former employees of the Failed Banks *employed by BANK ONE*. (Ex 75) Moreover, because the Proof of Claim was voluntarily withdrawn pursuant to Bankr. R. 3006, it has no judicial estoppel effect. *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 86 (1st Cir. 1990).

Bridge Bank never intended to cover under its benefit plan anyone other than its own employees. Moreover, MCorp never intended to allow Bridge Bank to become a participating employer in its MEBA Plan. In truth, Petitioners conjured up a false "dilemma" to stall transfer of funds. Since those funds have now been spent, Petitioners seek to eliminate their own duty to provide future benefits to retired and disabled employees of the Failed Banks under the guise of requesting approval from the courts of their allocation scheme, and without joining those most interested in whether their actions were proper. The court of appeals correctly refused Petitioners' estoppel claim and interpreted the meaning of the ERISA documents in accord with their plain meaning.

## II. The Court of Appeals Correctly Ordered Dismissal of the Case Below Even Though Fiduciary Instructions Were Sought as Alternative Relief Because Persons Whose Interests Would be Directly Affected By Such Instructions Had Not Been Joined As Parties.

Petitioners continue to seek relief in the form of instructions approving their previous actions designed to relieve the MEBA Plan from liability to the retired and disabled former employees of the Failed Banks without ever having joined the latter as necessary parties. Petitioners' own authority cited in support of their request for instructions recognizes that "[a]ll beneficiaries should be

made parties, unless they are otherwise adequately represented." Bogert & Bogert, *Law of Trusts and Trustees*, Section 559 at 165-6(2)(d) Rev. Ed. 1980. There are no parties to the current action who can adequately represent the interests of the retired and disabled former employees of the Failed Banks.

Federal Rule of Civil Procedure 19(a)(2) requires joinder of any person who claims "an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest." See *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305 (5th Cir. 1986)(dismissal of suit necessary where failure to join other persons might prejudice them by a negative precedent); *Hansen v. Peoples Bank of Bloomington*, 594 F.2d 1149 (7th Cir. 1979)(dismissal of suit seeking dissolution of a trust required in absence of joinder of all beneficiaries). Since the necessary parties for the relief sought by Petitioners were not joined in this action, it was appropriate for the court of appeals to remand for dismissal of this action, particularly as to the BANK ONE Respondents who have no interest in further instructions about the MEBA Trust.

## III. The Stay Ordered by the Court of Appeals Pending Appeal Was Proper and Cannot Itself Constitute Reversible Error.

Petitioners' complaints about the court of appeals' grant of a stay pursuant to 12 U.S.C. § 91 are moot. In light of the court of appeals' reversal of the district court judgment, the stay no longer has any effect. Petitioners' argument should be rejected as there is no live controversy affecting the rights of litigants to the proceedings. *See Taylor v. McElroy*, 360 U.S. 709 (1959).

In any event, the court of appeals' stay of the district court judgment pursuant to 12 U.S.C. § 91 was proper. Section 91 states in pertinent part that "no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding . . ." The § 91 prohibition against attachments, injunctions, or executions against a national banking association before final judgment has been a part of the federal statutes law since 1873.

Petitioners do not—and cannot—claim that the judgment in this case was final while it was being appealed. *See United States v. LeMaire*, 826 F.2d 387, 390 (5th Cir. 1987), *cert. denied*, 485 U.S. 960 (1988). Instead, Petitioners argue that § 91 is not applicable because the district court's declaratory judgment affects non-bank parties and did not order Respondents to pay any *specific* sum of money. As recognized by all parties, however, the district court's judgment created a significant monetary liability for BANK ONE as well as for the Bridge Bank Plan and Trust. The latter two entities, of course, receive all their funds from contractual commitments by BANK ONE. The relationships between the judgment debtors and the judgment obligations thus were so inextricably intertwined as to require a stay of all provisions to have any meaningful effect.

Declaratory judgments can be the equivalent of money judgments. *See Hebert v. Exxon Corp.*, 953 F.2d 936 (5th Cir. 1992) (district court abused its discretion in refusing to stay a declaratory judgment). The district court's judgment, if not stayed, would have required BANK ONE to fund a liability estimated at $125,000.00 per month. In fact, for the one month before the stay was obtained, BANK ONE paid that amount to the MEBA Plan in accordance with the district court's judgment.

The grant of the stay, as noted by the court of appeals, was designed simply to continue the status quo prior to entry of the district court's judgment. (Pet 4a) Regardless of the applicability of § 91, the stay was within the court of appeals' power as argued by BANK ONE in its Motion to Stay filed in the court of appeals. 28 U.S.C. § 1651; see also Fed. R. App. P. 8 and *Notes of Advisory Committee on Appellate Rules*. Since Respondents were successful in obtaining reversal of that judgment on appeal, the granting of the stay cannot itself constitute reversible error.

## IV. The Court of Appeals Acted Within the Parameters of Its Judicial Power Obviating the Need for an Exercise of This Court's Powers of Supervision.

The court of appeals properly granted an interim stay of a judgment that it subsequently reversed. It also properly reviewed Petitioners' request for contract interpretation and declaratory judgment on a *de novo* basis. The court of appeals did not make fact findings; instead, it corrected erroneous conclusions of law. Finally, the court of appeals was not required to grant fiduciary instructions requested by Petitioners or remand the case for consideration of claims affecting 900 people who were not made parties to this action.

The court of appeals correctly interpreted the plain meaning of the documents forming the MEBA Plan and Trust. That court, like the district court, recognized the potential human impact of its decision by noting that it was "touched by the plight of the Subject Participants." It, however, properly confined its review to one of contract interpretation and found that Bridge Bank did not assume responsibility for welfare benefits for retired and disabled

former employees of Failed Banks who never become Bridge Bank employees.

Bridge Bank was not required to provide employee benefits of any type. It should not be penalized for providing benefits to its 7,000 employees by being required to assume liability for benefits to 900 other people whom it never employed. Bridge Bank contributed to the resolution of the Texas banking crisis by purchasing some of the assets of the Failed Banks. It did not, however, assume all of the liabilities of those Failed Banks. Many potential liabilities, including those relating to the funding of the MEBA Plan and Trust, if any, remained with the receiver for the Failed Banks to be satisfied according to the priorities set forth in federal law. Petitioners simply failed to pursue claims against those receiverships—their proper course for relief.

## CONCLUSION

The court of appeals carefully reviewed the pertinent MEBA Plan and Trust documents and corrected erroneous conclusions of law. Bridge Bank could not have become a "participating employer" under the MEBA Plan and Trust because the terms of the documents precluded such a result. MCorp also blocked that result by refusing to approve Bridge Bank's participation. Moreover, Bridge Bank never adopted the terms of the MEBA Plan and Trust. Instead, it established a successor trust for the benefit of its active employees. By doing so, it did not inadvertently take on a $30 million liability for benefits to people it never employed. Since the court of appeals properly exercised appellate review of the judgment, the petition for writ of certiorari should be denied.

Respectfully submitted,

Peter F. Lovato, III

HOPKINS & SUTTER
3700 Bank One Center
1717 Main Street
Dallas, Texas 75201
(214) 653-2100
(214) 653-2255 (facsimile)

ATTORNEY FOR BANK ONE RESPONDENTS

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Lori B. Bellows
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1717 Main Street
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APPENDIX A-1

MCorp

May 5, 1989

Peter B. Bartholow
Group Chairman
Planning and Finance

Deposit Insurance Bridge Bank
5th Floor
1717 Main Street
Dallas, Texas 75201

Attention: Mr. James B. Gardner

Please be advised that the Compensation Committee of our Board has adopted resolutions amending the MCorp MoneyMax Plan, the MCorp Pension Plan and the Mercantile Employees Beneficiary Association (VEBA). These resolutions and amendments clarify language in the plans and related trusts to reflect the original intention of the company as sponsor. The amendments clarify that an employing business entity is not permitted to be or become an adopting employer without application to and consent of MCorp, as the plan sponsor. The amendments adopted by the Compensation Committee also confirm that the Bridge Bank is not a "successor" or "successor employer" as such terms are used in the plan documents and related trust instruments. The resolutions make such other amendments to the plans as are necessary under the relevant law and appoint members to the Benefits Committee.

Thus, MCorp will consider any application for plan adoption that Bridge Bank wishes to make, subject to bankruptcy court approval requirements after a hearing on

notice to MCorp's creditors, stockholders and other parties in interest in MCorp's chapter 11 case.

Very truly yours,

(signature)

Peter B. Bartholow

PBB:sk

cc: Mr. Thomas T. Sieling
MTrust

P.O. Box 655415, Dallas, Texas 75265-5415
1717 Main, Dallas, Texas 75201, (214) 290 2000
MCorp Member MCorp

APPENDIX B-1

# EXCERPTS FROM FIRST AMENDMENT TO THE MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION TRUST AGREEMENT

THIS AGREEMENT made and entered into in the City of Dallas, State of Texas, by and between MCorp, a Delaware corporation, with its principle office and place of business in Dallas County, Texas (hereinafter sometimes called the "Company"), and MTrust Corp, N.A. (hereinafter referred to as the "Trustee").

W I T N E S S E T H :

WHEREAS, the Company (previously known as Mercantile Texas Corporation) established the Mercantile Employees' Beneficiary Association and entered into a trust agreement related thereto (the "Trust Agreement"), effective as of August 1, 1983;

WHEREAS, the Compensation Committee of the Company has authorized this First Amendment to the Trust Agreement to amend and supplement the Trust Agreement.

NOW THEREFORE, pursuant to the powers reserved in Section 10.01 of the Trust Agreement and for the purpose of consummating amendments of the Trust Agreement, the Company does hereby amend the Trust Agreement, effective as of March 28, 1989, so that such provisions shall read as follows, and, in consideration of the premises, the Company and Trustees do hereby agree:

APPENDIX B-2

I.

Article XI of the Trust Agreement is hereby amended, by deleting Section 11.02 therefrom and by substituting in lieu thereof the following Section 1102:

> 11.02 Continuation by Employer's Successor. Any corporation succeeding to the interest of an Employer by sale, transfer, consolidation, merger or bankruptcy, may elect to continue this trust by adopting this trust agreement and assuming the duties and responsibilities of the Plan, if approved by the Board of Directors of the Company, and this trust, or such corporation may establish a separate plan and trust for the continuation of benefits for its employees, in which event the trust assets, held on behalf of the employees of the prior Employer, shall be transferred to the trustee of the new trust, as, if, and when approved by the Board of Directors of the Company.

II.

Except as amended by this instrument, the Trust Agreement shall remain in full force and effect. This instrument may be executed in a number of counterparts, each of which shall be deemed to be an original even though the others are not produced and all of which collectively shall be deemed to be but one instrument.

IN WITNESS WHEREOF, this Amendment has been executed this 5th day of May, 1989, effective as of March 28, 1989.

(signatures deleted)

APPENDIX C-1

MCorp
A Momentum Company

June 5, 1989

VIA CERTIFIED MAIL

Mr. James B. Gardner
President
Deposit Insurance Bridge Bank, N.A.
1717 Main Street
Dallas, Texas 75201

Re: Response to Your Letters Dated May 10 Regarding the MCorp Benefit Plans

Dear Mr. Gardner:

Neither your letters of May 10 regarding adoption of the MCorp Pension and MoneyMax Plans nor the attached resolutions indicated any viable procedure to adopt the MCorp Pension Plan or the MCorp MoneyMax Plan (collectively, the "Plans") in a manner that comports with the requirements of the Plans' documents. With respect to both the MCorp Pension Plan and the MCorp MoneyMax Plan, the provisions in Section 14.05 of both Plans were never intended to apply to the situation of a bank newly formed by the FDIC. The amendments referred to in my letter of May 5, 1989 merely clarify what the documents already provided; namely that adoption of the Plans requires approval of the MCorp Board of Directors. Your attorney John Collins has informed us that your letters were not intended to and are not to be taken by MCorp as a request to the MCorp Board of Directors for approval of adoption of

the plans by Deposit Insurance Bridge Bank, N.A. ("Bridge Bank"). Accordingly, as no response is necessary by the MCorp Board of Directors, the Board has not taken any action with respect thereto.

Please be advised that the Trustee, actuary and recordkeepers for the Plans have been informed by MCorp that Bridge Bank is not a participating or an adopting employer of the Plans or their related trusts and does not exercise any authority with regard to such Plans. Furthermore, no benefits will accrue under either of such Plans with respect to service with Bridge Bank.

With regard to your letter requesting withdrawal from the MCorp Cafeteria Plan, the MCorp Cafeteria Plan for Part-Time Employees, the MCorp Dependent Care Plan and the MCorp Supplemental Health Care Plan (the "MCorp Welfare Plans"), there is no need for a waiver of the notice to withdraw from the MCorp Welfare Plans as Bridge Bank is not, and has never been, an Employer as defined in any of these Plans. Employees of the banks listed in your letter ("Former MBanks") ceased to be employees of a participating employer on March 29, 1989. Consequently, they will not be entitled to any benefits from plans funded under said trust incurred after March 28, 1989.

We are willing to discuss with you on behalf of all of the participating active and retired employees of the Former MBanks a transfer of assets and liabilities from the MCorp Employees Beneficiary Association Trust to a trust similarly qualified under Section 501(c)(9) of the Internal Revenue Code. Of course, a transfer of assets can occur only if there is a transfer of corresponding liabilities. Please let us know whom we should contact to discuss the transfer of assets and liabilities under the MCorp Voluntary Employees Beneficiary Association.

If you have any questions concerning this matter, please feel free to call the undersigned.

Very truly yours,

(signature)

Peter B. Bartholow

PBB:BARTO:1072

cc: Mr. John Collins

APPENDIX D-1

MCorp

June 20, 1989

MTrust Corp, N.A.
1717 Main, 12th Floor
Dallas, Texas 75201

Re: MCorp VEBA

Gentlemen:

You have requested guidance on your acceptance, as Trustee, of funds being paid to the trust for the Mercantile Employees' Beneficiary Association (the "VEBA") and on payment of funds from the VEBA. This letter is in response to that request and may be used by you in this connection until further notice. Capitalized terms not herein defined have their respective meanings in the VEBA Trust Agreement.

A. Payments to the VEBA:

1. Contributions:

You should not accept or put into the VEBA any contributions from Bridge Bank or any Bridge Bank subsidiary relating to any period of coverage after March 31, 1989.

2. Cobra Premium Payments:

You should not accept or put into the VEBA any premium payments for COBRA continuation coverage from any former employee of Bridge Bank or any Bridge Bank subsidiary who terminated employment after March 31, 1989.

B. Distributions from the VEBA:

1. Pre April 1, 1989 Claims:

All claims for expenses incurred on or before March 31, 1989 under plans funded through the VEBA should be paid irrespective of the Participant's current employer.

2. Post March 31, 1989 Claims for Active or Former Bridge Bank Employees:

Claims by active or former Employees of Bridge Bank which were incurred after March 31, 1989 for all plans funded through the VEBA should not be paid.

3. Post March 31, 1989 Claims by Retirees Who Retired On or Before March 31, 1989:

Until an agreement can be reached with Bridge Bank or you are given different instructions, please continue all payments to (and accept all premium checks from) retirees (and employees on long term disability) who retired or terminated employment on or before March 31, 1989.

4. COBRA Continuation Coverage for Former Employees Whose Termination of Employment Occurred on or Before March 31, 1989:

Please continue, as required by law to make payments for COBRA continuation coverage for all former Employees who terminated employment on or before March 31, 1989.

5. COBRA Continuation Coverage for Former Bridge Bank Employees whose Termination of Employment Occurred After March 31, 1989:

No payments for COBRA continuation coverage should be made for former Employees who terminated employment from Bridge Bank or a Bridge Bank Subsidiary after March 31, 1989.

Sincerely,

(signature)

Jim F. Taylor

cc: Ms. Riva T. Johnson
Ms. Mary Jean Potenzone

APPENDIX E-1

ADMINISTRATIVE SERVICES AGREEMENT

THIS ADMINISTRATIVE SERVICE AGREEMENT (the "Agreement") effective as of March 29, 1989 (the "Effective Date"), is between Bank One, Texas, National Association, formerly The Deposit Insurance Bridge Bank, National Association, ("Bank One") and MCorp, a Delaware corporation ("MCorp"). The purpose of this Agreement is to describe the duties and obligations of the parties and to insure that Bank One's relationship to MCorp is one of independent contractor.

W I T N E S S E T H:

WHEREAS, MCorp desires to utilize Bank One's knowledge and experience in administering, maintaining and managing certain benefit and compensation programs and payroll processing and accounting; and

WHEREAS, Bank One has agreed to provide MCorp certain services as an independent contractor in connection with the administration, maintenance and management of MCorp's and its affiliates' (i) benefit and compensation programs, including, but not limited to, Pension Plan, MoneyMax Plan, Cafeteria Plans, and welfare and qualified benefit plans (which include MCorp's group medical, supplemental health care plan, dependent care reimbursement plan, employee group term life insurance, long-term disability, group dental, business travel accident insurance, family life insurance, voluntary accidental death and dismemberment, sick pay and short-term disability) and (ii) payroll processing and accounting (all such services collectively referred to herein as "Human Resources Services");

NOW, THEREFORE, [illegible] premises and the mutual promises herein contained, the parties hereto agree as follows:

1. Administrative Services. Subject to the terms of this Agreement, Bank One shall provide certain Human Resources Services to MCorp. The Human Resources Services performed by Bank One shall consist of those being performed by Bank One for MCorp and its affiliates as of March 29, 1989. Bank One shall perform such Human Resources Services on substantially the same schedule as existed as of March 29, 1989 and the parties agree that Bank One and its agents will work free of supervision by MCorp, except as to the final result to the extent within general guidelines provided by MCorp and subject to the provisions of the relevant plans, management decisions and approvals. No substantial change shall be made in the scheduling of Human Resources Services and/or in Bank One's responsibilities with respect thereto without Bank One's prior written consent.

2. Term of Agreement. The term of this Agreement shall begin on the Effective Date and shall continue until terminated by thirty (30) days prior written notice by either party. From time to time, without terminating this Agreement, the Human Resources Services to be provided hereunder may be modified to include other services or eliminate one or more services (with appropriate adjustment of fees for services) by the mutual written agreement of Bank One and MCorp.

3. Fee for Services. MCorp shall pay Bank One $3,100 per week as remuneration for Bank One's services hereunder during the term of this Agreement.

4. Reimbursement for Expenses. During the term of this [illegible] shall also reimburse Bank One for payments made by Bank One to third parties reasonably resulting from requests by MCorp for special services hereunder (which special services are not of the nature previously regularly provided by Bank One to MCorp for periodic fees and without such reimbursement) upon submission and approval of expense statements and other supporting information in accordance with the general accounting policies of MCorp, as MCorp may adopt from time to time. In the event goods or services provided by such third parties benefit Bank One as well as MCorp, MCorp shall only be obligated hereunder to reimburse Bank One for a reasonable portion of payments related thereto (which portion shall, to the extent appropriate, be a percentage of such payments equal to the percentage that MCorp personnel, to which such special services relate, constitute of all personnel, to which such special services relate).

5. Continuing Cooperation by MCorp. Bank One's obligations under this Agreement are specifically conditioned upon the continuing cooperation by MCorp and its affiliates in making available to Bank One (i) specific information, (ii) the COBRA Administration System and Reimbursement-Account Administration System, licensed by The Wyatt Company to MCorp (the "Wyatt Software") and (iii) the HR Plus Payroll System, licensed by McCormack & Doge Corporation to MCorp (the "M&D Software"), as necessary for Bank One to provide the services described in Section 1 above. MCorp agrees to permit Bank One to continue to use the Wyatt Software and M&D Software, and Bank One will only use the Wyatt Software and M&D Software in order to provide Human Resources Services hereunder. Notwithstanding the foregoing, MCorp shall not have any obligation whatsoever to provide Bank One any

information or other cooperation or permit Bank One to use the Wyatt Software or M&D Software to the extent MCorp is precluded by reason of legal, accounting or regulatory requirements beyond its [illegible] any reason whatsoever, to provide such information or other cooperation or permit such use shall not be a default hereunder or the basis or any claim by Bank One for damages or other amounts and, in the event of any such failure, shall only excuse Bank One's performance of its obligations under this Agreement to the extent such performance is reasonably precluded by such failure. Bank One shall promptly notify MCorp of any such failure.

6. Confidentiality. Bank One acknowledges that all information provided to Bank One by MCorp or its affiliates, whether before or after the Effective Date, including, but not limited to, data relating to any employee or benefit or compensation package of MCorp or its affiliates, salary or other payroll information and the Wyatt Software and M&D Software (collectively "Confidential Information"), shall be and remain MCorp's property and was received by Bank One in strict confidence. Bank One agrees that, except as specifically authorized in writing by MCorp, Bank One will not, and will cause its officers, employees and agents not to (i) disclose any Confidential Information to any person or entity, (ii) make use of any Confidential Information for its own purposes (except as necessary or convenient to perform its obligations under this Agreement), or for the benefit of any other person or entity, other than MCorp or its affiliates or (iii) use such Confidential Information in a manner violative of applicable law or regulatory requirements. Upon termination of this Agreement or on such earlier date as MCorp requests or the same is no longer required by Bank One in order to perform its obligations pursuant to this Agreement, such Confidential

Information shall promptly be returned to MCorp by Bank One.

7. [Illegible] duties and obligation under this Agreement, the parties hereto acknowledge that Bank One is acting as an independent contractor. This Agreement shall not be interpreted as to create an employer-employee relationship between Bank One and MCorp or between MCorp and any employee of Bank One. Bank One shall have no authority to act for or represent MCorp in any way or otherwise be deemed an agent of MCorp or enter into agreements on behalf of MCorp, settle any claims against MCorp, represent itself as acting on behalf of MCorp or otherwise bind MCorp. Bank One shall be responsible for all federal, state and local income taxes, unemployment taxes, social security contributions, worker's compensation premiums and all other taxes and payments with respect to the services of its employees rendered under this Agreement.

8. Hold Harmless. MCorp shall forever protect, save and keep Bank One, its officers, directors, and employees, harmless and indemnify Bank One, its officers, directors, and employees, against and from any loss, costs, liability, expense, suits or actions, judgments and liabilities of any kind (including payment of reasonable attorney fees) arising out of or in any manner connected with the performance of services under this Agreement other than those arising from the willful misconduct or gross negligence of Bank One or such officers, directors and employees; provided, however, that this Section 8 shall not apply unless Bank One notifies MCorp promptly of any matters in respect of which the foregoing may apply and of which Bank One has knowledge and gives MCorp full opportunity to control the response thereto and the defense thereof, including, but not limited to, any agreement relating to the settlement thereof. In accordance with the foregoing indemnity, MCorp

shall provide a defense for, or reimburse all costs of defense incurred by, Bank One's officers, directors and employees in any such suit or action in the event MCorp and Bank One agree, in good faith, that it appears that such suit or action did not arise out of and was not in any manner connected with the willful misconduct or gross negligence of Bank One or its officers, directors or employees.

9. Notices. Any notice required or permitted to be given pursuant to this Agreement shall be effective on the date of receipt, and shall be in writing and either hand delivered or mailed by registered or certified mail, return receipt requested, to the appropriate party at the address shown below:

If to Bank One:

Bank One, Texas, National Association
1717 Main Street, 5th Floor
Dallas, Texas 75201

Attention: James B. Gardner

If to MCorp:

MCorp
1717 Main Street
1900 Momentum Place
Dallas, Texas 75201

Attention: Jimmy F. Taylor

10. Waiver and Amendment. No waiver or modification of this Agreement or of any covenant, condition or limitation herein contained shall be valid unless in writing and duly executed by both Bank One and MCorp.

11. Entire Agreement. This Agreement contains the entire agreement between Bank One and MCorp and

constructed in accordance with prior agreements, negotiations and understandings as to the subject matter hereof. As of the Effective Date, all Human Resources Services provided by Bank One to MCorp or its affiliates shall be deemed to have been performed pursuant to this Agreement and the parties acknowledge that no other agreement, whether oral or written, or fees shall be applicable thereto or payable therefore.

12. Agreement Binding. The provisions hereof shall inure to the benefit of, and be binding upon, and be enforceable by the parties hereto and their respective successors and assigns. In the event of a sale of the stock or substantially all of the assets of Bank One, Bank One will cause the purchaser to assume all obligations pursuant to this Agreement.

13. Assignment. This Agreement shall not be assignable or transferable by either party except by the written consent of the other party.

14. Titles. The titles of the sections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement.

15. Severability. If any provision of this Agreement shall be held to be invalid, illegal or unenforceable, such provision shall be fully severable, and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

16. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas. Venue and jurisdiction for an action under this Agreement shall be in Dallas County, Texas.

17. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall together constitute one in the same Agreement.

IN WITNESS WHEREOF, this Agreement is hereby executed as of this 22 day of August, 1989.

BANK ONE, TEXAS, NATIONAL ASSOCIATION:

James B. Gardner

By: James B. Gardner

Title: Vice Chairman

MCORP:

Peter B. Bartholow

By: Peter B. Bartholow

Title: Group Chairman